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Nos. 89-1452, 89-1453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MOBIL OIL EXPLORATION AND
PRODUCING SOUTHEAST, INC., *et al.*,
Petitioners,
v.

UNITED DISTRIBUTION COMPANIES, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.

UNITED DISTRIBUTION COMPANIES, *et al.*,
Respondents.

**On Petitions for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

RESPONSE OF RESPONDENTS PROCESS GAS CONSUMERS GROUP, AMERICAN IRON AND STEEL INSTITUTE, AND GEORGIA INDUSTRIAL GROUP IN SUPPORT OF PETITIONS

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission has statutory authority to raise the ceiling price applicable to certain categories of gas under the Natural Gas Policy Act of 1978.

2. Whether the Commission has statutory authority under the Natural Gas Act to establish on a generic basis the conditions under which abandonments of service may be pre-authorized, instead of considering each abandonment request individually, in case-by-case adjudication.

3. Whether the Commission acted within its combined powers under the Natural Gas Act and the Natural Gas Policy Act of 1978 in developing its carefully crafted, complex, Order 451 program for eliminating persistent market distortions created by the effects of industry changes and vestigial wellhead price controls.

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Respondents the Process Gas Consumers Group ("PGC"), the American Iron and Steel Institute ("AISI"), and the Georgia Industrial Group ("GIG") (collectively the "Industrial User Groups") respectfully request that this Court grant the Petitions for Writ of Certiorari sought herein in Docket Nos. 89-1452 and -1453 to review

the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in *Mobil Oil Exploration and Producing Southeast, Inc. v. FERC*, 885 F.2d 209 (5th Cir. 1989), *rehearing denied*, —— F.2d —— (5th Cir., Dec. 15, 1989).

PGC is an unincorporated association of industrial consumers of natural gas, organized to promote the development and adoption of coordinated, rational, and consistent federal and state policies with respect to gas service to industrial process gas users. PGC members own and operate hundreds of plants in virtually every state in the nation.[1]

The American Iron and Steel Institute ("AISI") is the principal trade association of the domestic steel industry. It is an incorporated trade association with no parent or subsidiaries. Its 41 domestic member companies account for approximately 80% of the raw steel production capabilities in the United States.[2] AISI members use natural gas in a variety of manufacturing processes.

[1] The member companies of the Process Gas Consumers Group are: Alcan Aluminum Company; Aluminum Company of America; American National Can Company; Armco Inc.; Bethlehem Steel Corporation; Carpenter Technology Corporation; Cone Mills Corporation; Corning Incorporated; Eaton Corporation; Ford Motor Company; General Motors Corporation; LTV Steel Company; National Steel Corporation; Owens-Corning Fiberglas Corporation; Owens-Illinois, Inc.; PPG Industries, Inc.; and The Procter & Gamble Company.

[2] The member companies of the American Iron and Steel Institute are: Acme Steel Company; Armco Inc.; Atlantic Steel Company; Avesta Stainless Inc.; Berg Steel Pipe Corporation; Bethlehem Steel Corporation; Citisteel USA, Inc.; Cleveland-Cliffs Inc.; CSC Industries, Inc.; A. Finkl & Sons Co.; FirstMiss Steel, Inc.; Geneva Steel Company; Georgetown Industries, Inc.; Gulf States Steel, Inc.; M.A. Hanna Company; Harsco Corporation; Hi Specialty America; Inland Steel Industries, Inc.; Earle M. Jorgensen Company; Laclede Steel Company; Lone Star Steel Group, Lone Star Technologies, Inc.; LTV Steel, Inc.; Lukens Inc.; McLouth Steel Products Corporation; National Steel Corporation; North Star Steel Company, Ocean State Steel, Inc.; Oglebay Norton Company; Raritan River Steel Company; Republic Engineered Steels, Inc.; Rouge Steel Company; Sandvik Inc.; Sharon Tube Company; Shenango Incorporated; The Timken Company; USS, A Division of USX Corporation; Warren Consolidated Industries, Inc.; Weirton Steel Corporation; Wheatland Tube Company; Wheeling-Pittsburgh Steel Corporation; The Algoma Steel Corporation; Atlas Steel Inc.; Dofasco Inc.; IPSCO; QIT-Fer et Titane Inc.; Sidbec-Wosco Inc.; Stelco Inc.; Sydney Steel Corporation; Compania Siderurgica Huachipato S.A.; and Hylsa, S.A.

GIG is an unincorporated association of industrial users of natural gas located in the state of Georgia.[3] GIG members actively participate in a variety of state and federal proceedings affecting the prices of natural gas and electricity in the state of Georgia.

STATEMENT

Respondents the Industrial User Groups hereby adopt the Statement of Petitioner the Federal Energy Regulatory Commission.

REASONS FOR GRANTING THE PETITIONS

I. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE SERIOUS ADVERSE IMPACTS, BOTH DIRECT AND INDIRECT, THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WILL HAVE ON GAS CONSUMERS.

The United States Court of Appeals for the Fifth Circuit vacated Order Nos. 451 and 451-A of the Federal Energy Regulatory Commission ("FERC" or "Commission") because, it found, FERC had failed to adhere to

[3] The member companies of the Georgia Industrial Group are: Anglo-American Clays Corporation; Archer-Daniels-Midland Company; Burgess Pigment Company; Chemical Products Corporation; Engelhard Corporation; Ford Motor Company; General Motors Corporation; Georgia Kaolin Company; J.M. Huber; Nabisco Brands, Inc.; Nord Kaolin Company; The Procter & Gamble Company; Southwire Company; and Thiele Kaolin Company.

the consumer protective goals of the Natural Gas Act and the Natural Gas Policy Act of 1978 ("NGPA").[4] The Industrial User Groups are members of the prime constituency that the court below sought to protect, gas consumers. Nevertheless, the Industrial User Groups ask this Court to grant the Petitions for Certiorari and reverse the decision of the court below.

1. The court of appeals erred in failing to recognize that each of the details of FERC's Order No. 451 price ceiling increases and good faith negotiation procedures was fully within FERC's authority. Order Nos. 451 and 451-A did not achieve a *de facto* deregulation of old gas prices, as the court claimed,[5] but instead worked a legitimate, *de jure* administrative adjustment of gas prices to "just and reasonable" levels.

From the outset, the Industrial User Groups have supported the Commission's initiatives in the Order No. 451 program. Indeed, in response to the proposals originally advanced by the Department of Energy, the Industrial User Groups urged the Commission to establish a new, single, "just and reasonable" ceiling price for all "old" gas that was equivalent to the post-1974 vintage, and argued that it was empowered to do so. The Groups also contended that the Commission could (as it did) compel producers to renegotiate the prices charged for high-priced gas as part of the process of renegotiating the prices for "old," low-priced gas. The Groups' arguments on these issues are effectively presented in the Petitions and will not be repeated here. Accordingly, for the reasons set forth more fully by the Petitioners herein, the Industrial User Groups maintain that the Commission was fully authorized under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d (1988), and Sections 104(b)(2) and 106(a) of the NGPA, 15 U.S.C. §§ 3314(b)(2), 3316(c) (1988), to devintage certain "old" gas prices, and to apply a replacement cost methodology to establish a new "just and reasonable" ceiling applicable to that gas.

[4] Appendix A at 3a, 6a, 8a n.12, 20a-21a, 36a. References to Appendix A herein denote pages in Appendix A of the Petition of the Federal Energy Regulatory Commission.

[5] Appendix A at 11a.

It is well established that the Commission has broad discretion in determining "just and reasonable" ceiling prices and may use a wide variety of methods in order to establish such prices consistent with its overall regulatory goals and responsibilities. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) ("[t]he Commission's broad responsibilities . . . demand a generous construction of its statutory authority.") The Commission must be "'free . . . to devise methods of regulation capable of equitably reconciling diverse and conflicting interests.'" *American Pub. Gas Ass'n* v. *FPC*, 567 F.2d 1016, 1058 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978), *citing Mobil Oil Corp. v. FPC*, 417 U.S. 283, 331 (1974). "[T]he breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate to the solution of its intensely practical difficulties." *Permian Basin*, 390 U.S. at 790.

The Commission thoroughly documented the serious market distortions and severe regional price disparities that were impairing its efforts to adhere to the intent of the NGPA Congress and create a truly national gas market. Taking into account the limitations on its statutory authority, FERC raised ceiling prices for only those categories of gas as to which the NGPA gave it explicit authority to do so. It conservatively adopted as the new ceiling price for this gas the post-1974 vintage price, which had already been found by a reviewing court to be a "just and reasonable" price. *See American Pub. Gas Ass'n v. FPC*, 567 F.2d at 1053, 1063-64. FERC also crafted a detailed, complex, good faith negotiation mechanism, each stage of which was deliberately designed

to fulfill its regulatory responsibilities. Importantly, the Commission took these actions in response to the "intensely practical difficulties" it faced as gas markets changed and regional price disparities engendered by vestigal wellhead price controls grossly distorted energy prices paid by consumers (including Industrial User Group members), merely by their fortuitous location in different parts of the country.[6] If the decision of the Fifth Circuit court is allowed to stand and Order Nos. 451 and 451-A are vacated *ab initio*, six years of arduous market-ordering progress will be undone.

FERC also adopted Order Nos. 451 and 451-A in the expectation that an addition 11 Tcf of gas supplies, which otherwise would have been abandoned as uneconomic, would be produced.[7] Because no fuel will substitute for natural gas in "process uses," the availability of these significant additional gas supplies is very important to members of the Industrial User Groups.

The decision of the court below to vacate these orders will have an enormous, adverse impact not only on producers of "old gas," but on the Nation's gas consumers as well. In light of the enormous, real world impacts of the vacating of Orders Nos. 451 and 451-A, certiorari should be granted.

2. At the heart of FERC's several initiatives designed to introduce the benefits of competition into the gas industry is the need for the free alienability of gas supplies. Preauthorization for abandonment of gas service

[6] In proposing its rule, the Department of Energy noted that, due to historical accident, regional disparities in gas prices were unfairly harming industrial users in some areas of the country by comparison to their competitors located in regions where cheaper gas supplies were available. Ceiling Prices; Old Gas Pricing Structure, Notice of Proposed Rulemaking, 50 Fed. Reg. 48,540, 48,541-42 (1985).

[7] Order No. 451, 51 Fed. Reg. 22168 at 22180 (1986). FERC estimated that production of this gas would save consumers $25 billion. 51 Fed. Reg. at 22,172, 46,477; 50 Fed. Reg. at 48,540.

is an essential element to that alienability; today's markets often proceed on a month-to-month or even a week-to-week, basis. Individualized comparative needs hearings for each abandonment application, as would be required by the court below, are simply not pragmatically possible. For these reasons and the reasons set forth more fully in the Petitions, the Industrial User Groups assert that the court of appeals gravely erred in invalidating Order No. 451's pregranted abandonment feature.

The court's holding also conflicts with this Court's pronouncements in *FPC v. Moss*, 424 U.S. 494, 500 (1976). There this Court upheld FERC's authority to grant abandonments under Section 7(b) of the Natural Gas Act,[8] upon a finding that the *future* public convenience and necessity would be served. Pregranted abandonments make similar forward-looking findings. Moreover, the Fifth Circuit court's holding conflicts with recent decisions of the United States Court of Appeals for the District of Columbia Circuit,[9] and threatens FERC's Order Nos. 490 and 490-A, concerning Abandonments of Sales and Purchases of Natural Gas under Expired, Terminated, or Modified Contracts, which is presently before the Sixth Circuit.[10]

Invalidation of FERC's pregranted abandonment procedures will undermine literally thousands of ongoing contractual arrangements for the purchase and sale of natural gas. Industrial User Group members manufacture products that are highly sensitive to energy costs, and they thus purchase large amounts of gas on the spot market. Invalidation of FERC's pregranted abandonment regulations will disrupt the spot market and provoke an unprecedented realignment of gas supplies

[8] 15 U.S.C. § 717f(b) (1988).

[9] *See Kansas Power & Light Co. v. FERC*, 851 F.2d 1479, 1483-86 (D.C. Cir. 1988); *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1015 n.17 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

[10] 53 Fed. Reg. 4,121 and 29,002 (1988), *appeal docketed*, *Marathon Oil Co. v. FERC*, Nos. 88-3666, *et al.* (6th Cir. filed July 26, 1988).

among pipelines (thereby potentially exacerbating the very take-or-pay problem the court below faulted FERC for ignoring), and cause a massive shifting of economic rents among producers, pipelines, marketers, and consumers. The deleterious effects on consumers of the lack of access to Order No. 451-released gas, and to a spot market of economically priced gas that can be freely traded, cannot be overstated.

3. Judge Brown's dissent in *Mobil* details the importance of Order No. 451 to FERC's overall program that was designed to usher the natural gas industry into the new world of competition. Those arguments will not be repeated here. In light of the crucial significance of Order No. 451 to FERC's ongoing efforts to restructure the gas industry, however, the Industrial User Groups strongly believe that grant of the Petitions for Certiorari is fully warranted.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petitions of the Federal Energy Regulatory Commission and Mobil Oil Exploration and Producing Southeast, Inc., *et al.*, the Petitions for Writ of Certiorari should be granted.

Respectfully submitted,

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